UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WEST HARTFORD INITIATIVE TO SAVE HISTORIC PROPERTY, ELLEN BURCHILL BRASSIL, JASYN SADLER, BARBARA S. SCULLY,	:	
Plaintiffs,	:	
V.	:	CASE NO. 3:06-CV-739 (RNC)
TOWN OF WEST HARTFORD, BLUE BACK SQUARE, LLC,	:	
Defendants.	:	

MEMORANDUM OPINION[1]

Plaintiffs, an organization interested in preserving certain historic resources in the Town of West Hartford, and three residents of the town, bring this action under the Connecticut Environmental Protection Act ("CEPA"), Conn. Gen. Stat. §§ 22a-16, 22a-19a, against the Town and Blue Back Square, LLC ("BBS"), the developer of a large mixed-use development in the center of the Town known as "Blue Back Square," which is already well underway. The complaint alleges that BBS plans to demolish or substantially alter several buildings that the plaintiffs seek to have listed in the National Register of Historic Places.[2] CEPA

[1] On August 2, 2006, I issued an oral ruling and order dismissing this action for lack of subject matter jurisdiction. This memorandum provides a fuller explanation of the reasons for the ruling.

[2] The Secretary of the Interior has been authorized by Congress to "maintain a National Register of Historic Places composed of districts, sites, buildings, structures, and objects

creates a cause of action for declaratory and injunctive relief to prevent "unreasonable destruction of historic structures and landmarks of the state," which the statute defines as properties "listed or under consideration for listing" in the National Register, either as individual units or as part of an historic district. Conn. Gen. Stat. § 22a-19a.[3] Because there is no diversity of citizenship, the court has subject matter jurisdiction only if the CEPA claim can be said to "arise under" federal law for purposes of 28 U.S.C. § 1331. After careful consideration, I conclude that jurisdiction is lacking.

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significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. § 470a(a)(1)(A). Property may be added to the National Register by "[n]ominations prepared under approved State Historic Preservation Programs, submitted by the State Historic Preservation Officer and approved by the [National Park Service]." 36 C.F.R. § 60.1(b)(3). The National Park Service has promulgated regulations detailing the procedure by which State Historic Preservation Programs may submit nominations. See id. part 60.

[3] Section 22a-16 creates a cause of action for equitable or declaratory relief to protect the environment from unreasonable destruction. Section 22a-19a extends this provision

> to the unreasonable destruction of historic structures and landmarks of the state, which shall be those properties (1) listed or under consideration for listing as individual units on the National Register of Historic Places (16 U.S.C. 470a, as amended) or (2) which are part of a district listed or under consideration for listing on said national register and which have been determined by the State Historic Preservation Board to contribute to the historic significance of such district.

I. Background

The jurisdictional issue arises in the following context. In July 2004, the West Hartford Town Council unanimously approved the development plan for Blue Back Square, a $159 million project that includes condominiums, retail shops, offices, parking garages and a large movie theatre.[4] The plan anticipated that the Town would issue $48.8 million in bonds to help pay for the project. In addition, the plan anticipated that the Town would convey certain property to BBS, including the Town's Board of Education Building. In voting to approve the development plan, the Council also unanimously approved a number of related zoning applications and authorized the Town to execute a master agreement providing for the conveyance of the Education Building to BBS. It is undisputed that the Blue Back Square project involves no federal agencies, federal funds, or federal licenses.

Administrative appeals from the Town's zoning decisions were timely filed by plaintiff Jasyn Sandler, who owns and resides in a home near the Education Building and is a staunch opponent of the Blue Back Square project. In April 2005, all the zoning appeals were dismissed on the merits. See Sadler v. Town of West Hartford, Nos. CV044001119, CV044002125, CV044001448, CV044001388, 2005 WL 1155106 (Conn. Super. Ct. Apr. 22, 2005).

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[4] See "Town of West Hartford," "Blue Back Square," at http://www.westhartford.com/BlueBackSquare/BlueBackSquare.htm.; "Blue Back Square," at http://www.bluebacksqure.com.

In October 2004, while the zoning appeals were pending, a referendum was held in West Hartford on whether the Town should issue the bonds and convey the Education Building, as called for by the development plan. Approximately 60% of the voters cast ballots in favor of the project. See Daniela Altimari et al., Voters Approve Blue Back Square, Hard Fight, High Turnout Bring Housing and Retail Plan to West Hartford, Hartford Courant, Oct. 13, 2004, at A1, available at 2004 WLNR 19938995.

Soon after the referendum, an action was commenced in Connecticut Superior Court to stop the project on the ground that the planned conveyance of the Education Building would be illegal. The action was brought by West Farms Mall, LLC, which operates a large shopping mall not far from the center of West Hartford. In February 2005, the action was dismissed for lack of standing. See West Farms Mall, LLC v. Town of West Hartford, 279 Conn. 1 (2006).

On April 12, 2005, following dismissal of the action brought by West Farms Mall, LLC, the three individual plaintiffs in the present action -- Mr. Sadler, Ellen Burchill Brassil and Barbara S. Scully (who, like Mr. Sadler, reside in the Town and are deeply concerned about the fate of the Education Building and its surroundings) -- filed an eight-count complaint in Connecticut Superior Court seeking to stop the project. See Scully v. Town of West Hartford, UWY-CV-05-4009028S (CLD) ("the Scully case").

Among other things, the complaint alleged that the Town had unlawfully agreed to convey the Education Building to BBS for no consideration. The Town and BBS allege, and the plaintiffs do not deny, that the Superior Court action, which remains pending, is funded and controlled by the corporate parent of West Farms Mall, LLC, the Taubman Company.

The day after the plaintiffs filed the Scully case, the West Hartford Town Council voted to amend the Town's development agreement with BBS to allow construction of the project to get underway notwithstanding the pendency of litigation. The amendment led to a second referendum on June 23, 2005. This time, 70% of the voters approved going forward with the project. See Daniela Altimari & Tom Puleo, Blue Back: Yes Again, Groundbreaking In Town Center Set For August, Hartford Courant, June 23, 2005, at A1, available at 2005 WLNR 23571175.

On June 24, 2005, the day after the second referendum, Mr. Sadler commenced another Taubman-sponsored action in Connecticut Superior Court to prevent the Town from conveying the Education Building to BBS on the ground that the referendum was illegal. This was followed by the filing of two more such actions in July 2005 -- one by Mr. Sadler in Connecticut Superior Court against the State Traffic Commission, and the other by Mr. Sadler, Ms. Burchill and Ms. Scully in this court against the United States Secretary of Transportation. See Sadler v. Mineta, 3:05-CV-01189

(MRK) (filed July 26, 2005).

On September 9, 2005, the Town executed the master agreement and conveyed title to the Education Building to BBS. A few days later, the Connecticut Superior Court dismissed seven of the eight counts in the Scully case. See 2005 WL 2650138, at *5. The remaining count alleges that the Town acted in an arbitrary and capricious manner in approving the resolution authorizing the execution of the master agreement. According to the plaintiffs, a trial on that count is expected to begin later this year.

The plaintiffs commenced the present action on May 12, 2006. In their complaint, they allege that they seek to protect three historic structures -- the West Hartford Town Hall, the Noah Webster Library, and the Board of Education Building -- which comprise an "Historic District" eligible for inclusion in the National Register. The complaint alleges that the Blue Back Square project calls for demolition of the Education Building, as well as substantial alterations to the Town Hall, Library and surrounding grounds, and that each of these activities would constitute an unreasonable destruction of an historic structure under CEPA. The complaint seeks to prevent these activities from occurring unless and until a proper determination not to list the proposed "Historic District" has been made by the Keeper of the National Register.

The history and status of the plaintiffs' effort to have the

"Historic District" included in the National Register is not entirely clear, but the following facts appear to be undisputed. On April 13, 2005, the plaintiffs submitted to the State Historic Preservation Board ("SHPB") a request for a preliminary determination of whether the "Historic District" meets the criteria for inclusion in the Register. One week later, the Deputy State Historic Preservation Officer, J. Paul Loether, approved the initiation of a study for the purpose of making the requested determination. BBS filed a timely appeal. On June 9, 2005, the SHPB unanimously affirmed Mr. Loether's decision.

On March 9, 2006, the SHPB recommended that the nomination of the "Historic District" be forwarded to the Keeper of the National Register. However, on May 24, 2006, the State Historic Preservation Officer ("SHPO") concluded that BBS owns the Education Building for Register listing purposes. Under the National Historic Preservation Act ("the NHPA"), 16 U.S.C. §§ 470a, et seq., and implementing regulations promulgated by the Department of the Interior, if the owner of private property -- that is, the person or entity holding "fee simple title" -- objects to its inclusion in the Register, the Keeper may determine whether the property is eligible for listing but is prohibited from listing it without the owner's consent. See 16 U.S.C. § 470a(a)(6); 36 C.F.R. § 60.6(s); see also 36 C.F.R. § 60.3(k)(defining ownership to mean "fee simple title").

Accordingly, on June 6, the SHPO forwarded the nomination of the "Historic District" to the Keeper for a determination of eligibility only. On July 25, the Keeper found that the "Historic District" is eligible for Register listing but returned the nomination to the SHPO due to certain defects that must be corrected before the nomination is resubmitted.

II. Discussion

Given the limited nature of federal jurisdiction, the plaintiffs have the burden of demonstrating at the outset that the court has authority to hear this case. Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 98 (1993). In the absence of diversity of citizenship, this requires a showing that the action "arises under" federal law within the meaning of 28 U.S.C. § 1331.[5] Unlike the vast majority of actions arising under federal law, this case does not involve a cause of action created by federal law. Instead, plaintiffs invoke the court's jurisdiction to hear certain claims recognized under state law that require resolution of substantial questions of federal law. See Grable & Sons Metal Products, Inc. V. Darue Eng'g. & Mfg., 125 S. Ct. 2363 (2005).

In Grable, the Supreme Court sought to clarify the standard to be applied to determine when an action based on state law

[5] Section 1331 provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

"arises under" federal law for purposes of § 1331 due to the presence of a disputed federal issue. To satisfy the requirements of § 1331, the Court stated, the federal issue must be "a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum." Id. at 2367. Jurisdiction may be exercised, in other words, only if the federal issue embedded in the state law claim implicates a federal concern that "justif[ies] resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues."[6] Id. In addition to satisfying this test, the Court stated, the federal issue must be one that "a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Id. at 2368.[7]

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[6] The Court recognized that "constitutional questions may be the more likely ones to reach the level of substantiality that can justify federal jurisdiction." 125 S. Ct. at 2371 n.7.

[7] In Grable, the Internal Revenue Service seized the plaintiff's property to satisfy a federal tax delinquency and sold the property to the defendant. See 125 S. Ct. at 2366. Five years later, the plaintiff brought a quiet title action in state court, alleging that the defendant's title was invalid because the IRS had failed to provide him with written notice of its seizure of the property in the manner required by a provision of the Internal Revenue Code, 26 U.S.C. § 6335(a). Id. The defendant removed the case to federal court, asserting that jurisdiction was proper because the quiet title action turned on whether the notice provision in the Code required the IRS to effect personal service on the plaintiff, as he claimed, or only service by certified mail, the method used by the IRS. Id. The Court held that removal of the case was proper because the "meaning of the federal tax provision [was] an important issue of

In a more recent case, the Court observed that the authority conferred by § 1331 to decide a federal issue embedded in a state law claim is a "special and small category" of federal question jurisdiction. Empire Healthchoice Assurance, Inc. v. McVeigh, 126 S. Ct. 2121, 2136 (2006). The Court also indicated that an issue of federal law is more likely to qualify as substantial for purposes of § 1331 if the issue is a pure issue of law whose resolution "would be controlling in numerous other cases." Id. at 2137. By contrast, the Court implied, an issue that is "fact-bound and situation-specific" is less likely to provide a basis for exercising jurisdiction over a state law claim. Id.

The Court of Appeals has construed Grable to encompass a three-part inquiry: (1) whether the claim necessarily raises a stated federal issue, (2) whether the federal issue is actually disputed and substantial, and (3) whether the court may entertain the claim without disrupting the existing balance of state and federal judicial responsibilities. Broder v. Cablevision Sys. Corp., 418 F.3d 187, 195-96 (2d Cir. 2005).

Applying this test, the plaintiffs' claim for relief under CEPA requires them to establish that the Education Building is part of a district "under consideration for listing" in the Register. Conn. Gen. Stat. § 22a-19a. To meet this burden, they

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federal law that sensibly belong[ed] in federal court," and exercising jurisdiction was unlikely to open the federal "arising under" door to other state law claims. Id. at 2368.

must demonstrate that BBS's objection is ineffective to block Register listing. Their position that BBS's objection should be regarded as ineffective rests on two claims: (1) record title to the building was conveyed to BBS to prevent the Keeper from listing the "Historic District" in the Register after the SHPB had approved it for a National Register study; and (2) BBS's interest in the Education Building fails to qualify as fee simple title due to the Town's retention of significant rights in the property. These claims are intertwined with the listing process established pursuant to the NHPA, but this is insufficient to justify exercising federal jurisdiction. Rather, the plaintiffs' must demonstrate that all three of the requirements set forth in Grable are satisfied. In my opinion, they have not done so for the reasons stated below.[8]

The Issue of the Propriety of the Transfer of Title

On its surface, the plaintiffs' allegation that the Town transferred title to the Education Building to BBS in order to prevent the Keeper from including the proposed "Historic District" in the Register might seem to implicate a substantial

[8] It bears noting that jurisdiction may be lacking under the well-pleaded complaint rule on the ground that any federal issues in this case arise only from the plaintiffs' anticipation of a defense to the CEPA claim based on federal law. See Louisville & Nashville Railroad v. Mottley, 211 U.S. 149, 152 (1908)(federal jurisdiction cannot be based on plaintiff's anticipation of a federal law defense). I do not discuss this possibility in the text because the defendants do not take this view of the matter and I find jurisdiction to be lacking for other reasons.

federal interest. Careful study of the NHPA and its implementing regulations leads me to conclude, however, that any federal interest in the transfer of title is insufficient to warrant the exercise of jurisdiction over the plaintiffs' CEPA claim, even assuming the transfer was motivated to block the Keeper from listing the property in the Register.

To begin with, the NHPA does not apply to projects that lack federal involvement. As the Second Circuit has observed, the key section of the NHPA, section 106, is essentially a "stop, look and listen" provision that requires federal agencies, before approving funds or granting a license to any federal or federally-assisted project, to consider the potential impact of the project on properties that are listed or eligible for listing in the National Register. See 16 U.S.C. § 470f; Bus. & Residents Alliance of E. Harlem v. Jackson, 430 F.3d 584, 591 (2d Cir. 2005).[9] If such properties exist, the agency must submit the project for review and comment by the Advisory Council on Historic Preservation ("ACHP"), which is authorized to promulgate

[9] Some courts of appeals have recognized a cause of action under the NHPA against federal agencies. See, e.g., Boarhead Corp. v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991); Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown, 875 F.2d 453, 458 (5th Cir. 1989). But see San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1096 (9th Cir. 2005) (actions to enforce the NHPA must be brought under the Administrative Procedure Act). The Second Circuit has not addressed the issue. See Bus. & Residents Alliance of E. Harlem, 430 F.3d at 590 & n.7.

regulations that "govern the implementation of [section 106]." 16 U.S.C. § 470s. In the absence of federal involvement, as the defendants correctly emphasize, the NHPA places no restrictions on owners of historic property, even if the property is listed in the Register. 36 C.F.R. § 60.2 ("Listing of private property on the National Register does not prohibit under Federal law or regulation any action which may otherwise be taken by the property owner with respect to the property."); W. Mohegan Tribe v. New York, 246 F.3d 230, 232 (2d Cir. 2001) ("[T]he law makes it clear that violations of the NHPA can only be committed by a federal agency."); Moody Hill Farms Ltd. Partnership v. United States Dep't of Interior, 205 F.3d 554, 562 (2d Cir. 1999)("listing on its own does not impose any burdens on plaintiffs' use of their property. National listing constrains only the ability of departments of the federal government to take action affecting a listed property without first considering the effect of that action on the property.").

Research discloses two cases in which private parties sued in federal court on the basis of the NHPA to stop a project that lacked federal involvement. In Edwards v. First Bank of Dundee, 534 F.2d 1242 (7th Cir. 1976), the plaintiffs sought to enjoin a bank from demolishing a building listed in the National Register without first obtaining an opinion from the ACHP (among other things). The jurisdictional claim advanced by the plaintiffs was

similar to the one advanced here. As the court of appeals put it, the plaintiffs claimed that jurisdiction was available under the NHPA to prevent the bank from "frustrating or preempting the [ACHP's] responsibilities to prevent violation of the historical protections provided for under [the NHPA]." See id. at 1245. The district court granted the plaintiffs' motion for a preliminary injunction, but the court of appeals reversed and ordered the action dismissed for lack of subject matter jurisdiction. See id. at 1245-46. In doing so, the court of appeals specifically rejected the jurisdictional theory espoused by the plaintiffs.

In Canfora v. Olds, 562 F.2d 363, 364-65 (6th Cir. 1977), suit was brought against the Board of Trustees of Kent State University to enjoin the construction of a gymnasium on the site of the confrontation between the Ohio National Guard and Kent State students protesting the Vietnam War that resulted in the deaths of four students. The plaintiffs claimed that the court had jurisdiction to enjoin construction activities on the historic site while it was being considered for listing under the NHPA. The district court dismissed the action for lack of subject matter jurisdiction and the court of appeals affirmed.[10]

Because the NHPA does not apply to construction projects

[10] The plaintiffs cite no case, and none has been found, that adopts their jurisdictional theory.

affecting historic properties in the absence of federal involvement, preservationists must rely on state and local laws to protect properties from unreasonable destruction, as the plaintiffs do here. The legislative history of the 1980 amendments to the NHPA clearly shows that Congress intended this to be the case. As explained in the House Report that accompanied the successful bill, Congress wanted to strengthen the role of state programs for protecting historic resources, which had grown along with the historic preservation movement following the enactment of the NHPA in 1966, so that the states would be "the full 'partner' in the Federal program envisioned by Congress in the 1966 Act."[11] Consistent with this objective, the owner consent requirement at issue here was adopted to alleviate due process concerns, not because the NHPA or its implementing regulations would place restrictions on owners of properties included in the Register (as we have seen, they do not), but because state and local laws imposing such restrictions could be triggered automatically by Register listing.[12] The owner consent

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[11] See H. R. Rep. No. 96-1457, at 23 (1980), reprinted in 1980 U.S.C.C.A.N. 6378, 6386.

[12] See id. at 27, reprinted in 1980 U.S.S.C.A.N. at 6390:

> The Committee recognizes that listing on the National Register does not, under this Act or under the 1966 Act, restrict in any way what a private property owner can do with his or her property. The Committee also recognizes, however, that other State and local laws for the protection of historic properties could be triggered automatically by National Register listings.

provision was not intended to encourage the adoption of owner consent provisions at the state or local level.[13] Rather, as the House Report states, Congress recognized that "it is at the State and local levels of government, which have the police powers of zoning and other related regulatory tools, where more protective controls are appropriate."[14]

Given the NHPA's inapplicability to the Blue Back Square project, and the foregoing legislative history, I conclude that the transfer of title from the Town to BBS does not support the exercise of federal jurisdiction over the plaintiffs' CEPA claim.[15]

The Issue of Fee Simple Title

Whether BBS holds "fee simple title" to the Education Building, and thus owns the building for Register listing purposes,[16] clearly presents an issue of federal law. Under National Register regulations, however, this issue is to be

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[13] See id.

[14] See id.

[15] It is also worth noting that the existence of a valid objection to listing on the Register has little effect under federal law. The constraints on federal agency action apply regardless of whether property is actually listed or merely eligible for listing. See 16 U.S.C. § 470f. Because these constraints would apply even if a town transferred title to a private owner to manufacture an objection, such a transfer would have no federal consequences.

[16] See 36 C.F.R. § 60.3(k)(defining property owner as person or entity "holding fee simple title to the property)

determined by the SHPO from official land records or tax records. See C.F.R. § 60.6(c). Plaintiffs emphasize that the Keeper can review the SHPO's determination of property ownership. But the regulations do not suggest that the Keeper is supposed to review the SHPO's determination for conformity with a federal standard of fee simple title. Indeed, as the defendants argue, it is unlikely that the NHPA or its implementing regulations were intended to usurp the states' traditional authority to define property rights, particularly since the NHPA does not itself regulate private relationships. See, e.g., Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988) ("We see no reason to disturb the general proposition [that] the law of real property is, under our Constitution, left to the individual States to develop and administer." (internal quotation marks omitted) (alteration in original)); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.").

Because the issue of fee simple title turns on state property law, adjudicating the issue in this court cannot be justified in terms of the benefits thought to be offered by a federal court as a forum for determining issues of federal law. What constitutes "fee simple title" may well vary from state to

state, and federal judges have no special expertise in state property law. Accordingly, I conclude that the presence of this issue does not provide a basis for exercising jurisdiction over the plaintiffs' CEPA claim.[17]

The Balance of Judicial Responsibilities

The plaintiffs have also failed to demonstrate that exercising jurisdiction would not upset the existing balance of state and federal judicial responsibilities. They argue that Congress intended the NHPA to be the subject of litigation in federal courts, citing cases inferring a private cause of action against federal agencies from the statute's attorneys' fees provision, 16 U.S.C. § 470w-4. See Bus. & Residents Alliance of E. Harlem, 430 F.3d at 590 & n.7. But research discloses no case inferring a cause of action under NHPA against private parties, much less parties whose activities lack federal involvement. Congress could have provided for such a cause of action; it had an opportunity to do so when it enacted the 1980

[17] The plaintiffs suggest that whether property that is only eligible for listing is nonetheless "under consideration for listing" within the meaning of CEPA also presents a federal question justifying the exercise of jurisdiction. As defendants correctly point out, however, neither the NHPA nor its implementing regulations uses the term "under consideration for listing." The term is a creation of Connecticut law and must be construed as a matter of state law, although by reference to federal law. See, e.g., Hill/City Point Neighborhood Action Group v. City of New Haven, No. CV 0437784, 2000 WL 728841, at *4-7 (Conn. Super. Ct. May 18, 2000); 1984 Conn. Op. Atty. Gen. 292, 1984 WL 249235, at *2 (Conn. A.G. June 28, 1984).

amendments to the NHPA. As discussed above, however, it chose to promote reliance on state and local laws protecting historic properties, and the regulations promulgated by the Department of the Interior are fully consistent with this preference. See 36 C.F.R. § 60.2 (stating that the National Register is a "guide to be used by Federal, State, and local governments . . . to indicate what properties should be considered for protection from destruction" and that "[l]isting of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property").

Plaintiffs also argue that the exercise of jurisdiction in this case would have a minuscule impact on the balance of judicial responsibilities because cases under Conn. Gen. Stat. § 22a-19a are likely to be rare. Under Grable, the infrequency of cases brought under § 22a-19a counts in favor of exercising jurisdiction. However, the infrequency of quiet title actions raising tax issues was but one consideration in Grable. As defendants argue, exercising jurisdiction in this case could threaten to open federal courts to a bevy of other state law actions raising minor issues of federal law.

III. Conclusion

For the foregoing reasons, the court lacks subject matter jurisdiction over the plaintiff's claim for relief under CEPA.

Dated at Hartford, Connecticut this 18th day of August 2006.

/s/
Robert N. Chatigny
United States District Judge